84-136

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

No._____

P.E.P., INC., ET AL.,

Petitioners,

v.

MORAN MARITIME ASSOCIATES, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI
To The United States Court of Appeals
For The Eleventh Circuit

Edward R. Fink
Suite 309
2190 S.E. 17th Street
Fort Lauderdale, FL
33316
(305) 524-6289
Attorney for Petitioners

QUESTIONS PRESENTED

1. Was it error for the Courts below to exclude environmental concerns in making a salvage award?

2. Was it error for the Courts below to exclude the potential liability from a barge with over ten million gallons of high-test gasoline which was leaking and grounded in a populated area in making a salvage award?

3. Was it error for the Courts below to exclude evidence of the deliberate statutory violation which caused the grounding in making a salvage award?

4. Was the salvage award of $2,800 based upon a stipulated salved value of $20,362,747 so grossly inadequate that it fails to act as an incentive to others to provide assistance in similar situations?

5. Was it an abuse of discretion not to have awarded attorneys fees?

LIST OF ALL PARTIES

1. Plaintiffs

   a) Robert I. Jackson, duty pilot.

   b) Walter Swett, operator of the pilot boat.

   c) Edward Cray, deputy pilot.

   d) P.E.P., Inc.
   (A Florida corporation which owns the vessel "PILOT NO. 2" and employs the three individual Plaintiffs. "P.E.P." stands for Port Everglades Pilots.)

2. In Rem Defendants

   a) Barge "NEW YORK"
   O.N. 524266
   Documented under the laws of the United States.
   Stipulated value: barge, $9,000,000; gasoline cargo, $8,740,947.
   Owned by Moran Maritime Associates.

   b) Tug "ALICE MORAN"
   O.N. 570205
   Documented under the laws of the United States.
   Stipulated value: $2,621,800.
   Owned by Moran Atlantic Towing Corporation.

   Total stipulated value: $20,362,747.

3. In Personam Defendants

a) Moran Maritime Associates
One World Trade Center,
Suite 5335
New York, N.Y. 10048
A Partnership of Moran Barge Corp. and Overseas Petroleum Carriers, Inc. and owner of the barge "NEW YORK"

b) Moran Barge Corp., a Delaware corporation.
100 West 10th Street
Wilmington, Delaware 19801

c) Overseas Petroleum Carriers, Inc., a Delaware corporation.
100 West 10th Street
Wilmington, Delaware 19801

d) Moran Atlantic Towing Corporation
100 West 10th Street
Wilmington, Delaware 19801
Owner of tug "ALICE MORAN"

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OPINIONS BELOW

1. FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The District Court order of April 7, 1983, contains the following language:

> 3....In determining the amount to be awarded to each salvor, the Court is guided by the elements set forth in The Blackwall, supra.
> 4. The Court concludes as a matter of law that the following awards should be made in this matter as follows:
>
> | | |
> |---|---|
> | ROBERT JACKSON | $1,000.00 |
> | EDWARD CRAY | 600.00 |
> | WALTER SWETT | 600.00 |
> | P.E.P., INC. | 600.00 |
> | TOTAL | $2,800.00 |

2. ATTORNEYS FEES.

On April 8, 1983, the District Court issued an order which contains the following:

> ...Although this Court has the discretionary power to grant attorneys fees in admiralty cases, the Court concludes that there is no basis in this case for an award of attorneys fees...

3. FINAL JUDGMENT.

The Court ordered Final Judgment in accordance with the above on June 28, 1983.

4. COURT OF APPEALS.

The United States Court of Appeals for the Eleventh Circuit ruled on May 4, 1984. The opinion contains the following language:

> In determining the amount of the salvage award, the district court expressly indicated that the guiding principles are those articulated in The Blackwall, 77 U.S. (10 Wall.) 1, 14, 19 L.Ed. 870, ___ (1869). Appellants contend that the district court erred in relying exclusively on the principles established in The Blackwall. In appellants' view, those principles are too restrictive to provide adequate salvage awards in modern marine disasters. Appellants contend, therefore, that the salvage award was based on erroneous legal principles because the district court failed to consider, in addition to the principles established in The Blackwall, (1) the appellees' alleged negligence, and (2) appellees' potential legal

liability had not appellants helped to prevent catastrophic damage to the city of Fort Lauderdale from explosion or to the environment from pollution.

Arguably, it might not have been improper for the district court to have considered these factors suggested by appellants in computing the salvage award...

We are not prepared to hold, however, that the district court committed error in failing to consider these nuances in calculating the amount of the award. The court based its decision on the traditional principles of salvage award determination, those established in The Blackwall. Although The Blackwall does not contain a comprehensive catalog of the relevant factors, those principles are the core of any salvage award determination. The award, therefore, was not based on erroneous legal principles.

GROUNDS FOR JURISDICTION

1. This Petition seeks review of the Judgment of the United States Court of Appeals for the Eleventh Circuit entered on May 4, 1984.

2. This is a Petition for Certiorari filed pursuant to 28 U.S.C. § 1254 (1).

3. This Petition has been filed pursuant to 28 U.S.C. § 2101 (c) within ninety days of the ruling by the United States Court of Appeals for the Eleventh Circuit.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS

1. SALVAGE.

The law of salvage is based upon the general maritime law.

2. ENVIRONMENTAL LAWS.

33 U.S.C. § 1321 (Water Quality Improvement Act).

Florida Statutes § 376.12 (Florida Oil Spill Prevention and Pollution Control Act).

3. PILOTS.

46 U.S.C. § 8502 (Pilots).

46 U.S.C. § 3702 (Inspection of Dangerous Cargoes).

STATEMENT OF THE CASE

This case was heard under the admiralty jurisdiction of the District Court for the Southern District of Florida. It involves the grounding of a gasoline barge and a salvage award to the pilots who offered valuable advice to refloat it and move it to safety.

In the early hours of January 17, 1980, the tug "ALICE MORAN" attempted to bring the barge "NEW YORK" into Port

Everglades without the assistance of the pilot required by Federal law. The barge was 508.1-feet long and contained over ten million gallons of high-test gasoline. The channel was 500-feet wide with high-rise condominiums and hotels nearby.

The barge went aground on the edge of the entrance channel. It was holed and approximately 69,000 gallons of gasoline spilled into the harbor. Fumes spread over the area. The engine of the harbor tug "CAPTAIN NELSCN" exploded because it ingested fumes. The harbormaster closed Port Everglades and the 17th Street Bridge was closed to automobile traffic.

The harbormaster called the pilots on the telephone, and they immediately went to the aid of the grounded barge. They could smell gasoline as soon as

they went out the Seminole River Canal to the Intracoastal Waterway between the Marriott Hotel and Pier 66 Marina and Hotel. Captain Swett testified that that was the most frightened he had been in twenty-six years of running the pilot boat. Captain Cray, who was qualified as an expert witness in marine firefighting, testified that that was the most dangerous and scary position he was ever in. Captain Jackson testified that he got on the private radio channel to the harbormaster to alert the people in the condominiums. The pilots, nevertheless, proceeded into harm's way, under the 17th Street Bridge, past the piers in the harbor, and to the grounded barge near the channel entrance.

The pilots observed the harbor tug "FORT LAUDERDALE" towing the "CAPTAIN

NELSON" into the harbor and ascertained that everyone was safe. They then continued on and found that the tug "ALICE MORAN" had cut loose from the barge "NEW YORK" to get away from the fumes. At the request of Captain Romano of the "ALICE MORAN," the pilots explored around the grounded barge and reported a relatively safe approach to avoid the fumes and spill. They advised how to get a line over, where and how to pull, and where to go once the barge was refloated. A line was rigged and it probably prevented additional holing. The barge was refloated and moved to safety without further gasoline spill.

The case was heard in the United States District Court for the Southern District of Florida. The Court awarded a total of $2,800 to the pilots for their efforts based upon the Supreme

Court guidelines in The Blackwall, supra. The Court was asked, but declined, to consider additional criteria. The pilots appealed the award to the United States Court of Appeals for the Eleventh Circuit, but the award was affirmed.

The pilots now petition the United States Supreme Court to enlarge upon the six elements of a salvage award announced in 1869.

ARGUMENT

One hundred and fifteen years ago, Justice Clifford set forth six ingredients for a salvage award in The Blackwall, supra, as follows:

> Courts of Admiralty usually consider the following circumstances as the main ingredients in determining the amount of the award to be decreed for a salvage service:

(1) The labor expended by the salvors in rendering the salvage service.

(2) The promptitude, skill and energy displayed in rendering the service and saving the property.

(3) The value of the property employed by the salvors in rendering the service, and the danger to which such property was exposed.

(4) The risk incurred by the salvors in securing the property from the impending peril.

(5) The value of the property saved.

(6) The degree of danger from which the property was rescued.

The words "usually" and "main ingredients," plus the fact that ten million gallons of gasoline had yet to be refined in 1869, indicate that the list was not intended to be all-inclusive. The lower Court, nevertheless, in its conclusion of Law No. 3 stated: "In determining the amount to be awarded to each salvor, the Court is guided by the elements set forth in The Blackwall, supra."

The Eleventh Circuit concluded that such rigid adherence to the 1869 guidelines was not error, to wit:

> ...a court might possibly have considered appellees' negligence and potential liability in computing a salvage award.
>
> We are not prepared to hold, however, that the district court committed error in failing to consider these nuances in calculating the amount of the award. The court based its decision on the traditional principles of salvage award determination, those established in The Blackwall. Although The Blackwall does not contain a comprehensive catalog of the relevant factors, those principles are the core of any salvage award determination. The award, therefore, was not based on erroneous legal principles.

Two recent articles presented at the 1983 Tulane Admiralty Law Institute discuss the most comprehensive change to Lloyd's Open Form 1980 (LOF80) since Lloyd's first salvage agreement in 1890, and the Montreal Draft International Convention on Salvage in 1981.

The first article, "Conventions on Salvage" by the Honourable Sir Barry Sheen, Judge of the High Court of Admiralty, London, contains the following:

> ...Until the carriage of cargoes of oil there was, so far as I am aware, no cargo which could float off a sinking ship and be likely to cause damage to others. Some cargoes sank with the ship. Other cargoes floated ashore to the great benefit of those who found them. The concepts of flotsam, jetsam, and lagan come readily to mind, as also does derelict, all of which became wreck when found on the shores of the sea. Crude oil is, as we all know, very different...
>
> In 1977 the Liberian tanker Amoco Cadiz laden with crude oil had just entered the western end of the English Channel when a bolt in her steering gear sheered. The engineers were unable to rectify the fault or to bring into action the emergency steering. At that time Amoco Cadiz was ten miles off the coast. In due course the services of a powerful tug were engaged on the standard Lloyd's terms. When that tug made fast the tugmaster appeared not to appreciate, and understandably so, that Amoco

Cadiz had headway induced by the wind on her starboard bow. The towing hawser parted under the strain. Before another towing hawser could be connected, Amoco Cadiz had drifted onto the rocks of the coast of Brittany. The disastrous oil pollution which followed is well known to all. There were many faults which contributed to the causes of that disaster. I am not concerned to list them now. The only point which I want to make is this: If the first towing hawser had not parted, the task of that tug would not have been a difficult one. Amoco Cadiz had the use of her own engines. All that the tug would have had to do was to get her onto the right heading, and then a rapid tow could have been effected with Amoco Cadiz providing motive power. On that hypothesis it is probable that an arbitrator would have awarded a comparatively modest sum for salvage. Any argument that the tug had been instrumental in preventing oil pollution would probably have been received with derision. Otherwise it would follow that in every case in which a tanker carrying crude oil receives towage assistance some regard must be paid to the possibility of oil pollution...

"Conventions on Salvage" by the Honourable Sir Barry Sheen, Tulane Law Review, Vol. 57, No. 5, June 1983, p. 1387.

In the second article, by Donald R. O'May, Chairman, British Maritime Law Association Committee on Salvage, the following is pertinent:

> For more than seventy years the 1910 Brussels Convention on Salvage has withstood the test of time. It had bestowed upon it that rare accolade for international conventions, ratification by the United States of America. It might well have gone on to complete its century, had not the steering failed on the Amoco Cadiz in March 1978, whose subsequent grounding and oil pollution made front-page news throughout the world and brought the subject of salvage into sharp focus.
>
> The pressure for change in the law of salvage, and the search for solutions to contemporary problems, has evidenced itself in two ways. First, Lloyd's Salvage Agreement has had important additions made to its traditional form. Because of its worldwide use in major salvage cases, Lloyd's Form may

fairly be said to have a quasi-convention status. Second, the Comité Maritime International (CMI), at Montreal in May 1981, produced a new Draft Convention on Salvage...

There had been two divergent approaches in the International Subcommittee. The first, which had been adumbrated in the initial report of the Chairman, had proposed a concept of "liability salvage." This arresting, if rather misleading, phrase was shorthand for a novel idea which amounted to the following: That salvors, in addition to being remunerated out of the salved property fund for services to ship and cargo, should also be entitled to receive additional remuneration for relieving shipowners (and cargo interests) from liability to third parties which they might otherwise have incurred but for the salvors' efforts. So, if a laden oil tanker stranded, not only would the salvors be paid for refloating the tanker and salving her cargo, but also for preventing pollution of the beaches, fishing grounds and the like, for mitigating adverse effects on the local industry and tourist trade, and for avoiding damage to the "environment," in its widest sense...

> ...The alternative, and more viable solution, lay in enhanced awards. This idea was the solution adopted in the revision of Lloyd's Form. The award to the salvor reflects (but need not quantify as an independent element, except where the safety net is applicable) the services rendered by the salvor in preventing pollution in designated instances...
>
> "Lloyd's Form and the Montreal Convention" by Donald R. O'May, Tulane Law Review, Vol. 57, No. 5, June 1983, p. 1412.

The case before us now involves high-test gasoline rather than crude oil. This evaporates and does not pollute to the extent of crude oil. It does pollute, however, and an ignition source can produce an explosion. A welder's torch at the shipyard, a car on the bridge, or any other such source could have produced a catastrophic event.

Plaintiffs' expert testified that a gallon of gasoline is equal to six-

teen sticks of dynamite and that an explosion from a lesser spill in Newark had caused fire and blown out windows forty miles away. The Court excluded information concerning deaths and injuries in the Newark blast on the grounds that it was irrelevant. Luck was with those present in this case as there was no fire or explosion. The fumes, nevertheless, were sufficient to run the diesel engine of the tug "CAPTAIN NELSON" so fast that it was destroyed.

In case of explosion Moran would have lost its tug, barge, and cargo. Normally, this would have been the upper limitation of the potential loss because of limitation and because the salvage award usually is limited to the salved res. This is not the case here. The owners' misconduct/negligence would

have precluded their right to limit their liability to the tug, barge, and cargo, and there are statutory provisions which would make the owners liable for environmental damage from the gasoline spill without regard to the value of the tug, barge, and cargo.

Both Federal law, 33 U.S.C. § 1321 (b) (2) (B) (ii), and Florida law, Florida Statutes § 376.12, provide for payment of the full costs of environmental cleanup whenever willful negligence or willful misconduct is involved. Moran's failure to take on a pilot pursuant to 46 U.S.C. § 8502 and 46 U.S.C. § 3702 amounted to such willful misconduct. Thus, the liability of Moran for pollution resulting from this incident was unlimited.

Moran successfully filed for limitation pursuant to 46 U.S.C. § 183 (a).

Limitation should have been denied, however, because limitation will be denied when a ship is not properly manned, 3A Benedict on Admiralty, 7th Ed. § 42; and a vessel is not properly manned without a pilot aboard where one is required. W. E. Valliant & Co. v. Rayonier, Inc. (E. Madison Hall), 140 F.2d 589, 1944 A.M.C. 202 (4th Cir. (MD.) 1944). Thus, Moran's liability for catastrophic explosion would not have been limited.

We know that Moran's failure to take on a required pilot was not considered by the District Court in formulating the salvage award because they announced that they followed the Supreme Court guidelines in The Blackwall, supra, and because they excluded evidence that the tug captain's license was suspended by the Coast Guard for

the statutory violation on grounds that it was irrelevant. They also excluded as irrelevant expert testimony concerning the extent of death and injury in a gasoline spill which was similar except for the ignition.

CONCLUSION

> Marine salvage has been a recognized part of commercial transportation almost from the time when seafarers sailed their vessels out of safe harbors and ventured forth upon the sea. The ancient Rhodian law, nine hundred years before the Christian era, recognized the principle of offering a reward for the saving of imperiled maritime property.
>
> 3A Benedict on Admiralty, 7th Ed., § 1

This case illustrates that the need for a law of salvage is as great now as it was in Nine Hundred B.C. Moreover, the space shuttle signals the advent of a new era of perilous journeys wherein the time-tested laws of

the sea may provide a better precedent than the laws of the land. The law of salvage, however, needs new guidance to bring it into the Twentieth Century. It is up to this Court, having set forth the elements of a salvage award, to provide such guidance.

Respectfully submitted,

By: Edward R. Fink

Edward R. Fink
Suite 309
2190 S.E. 17th Street
Fort Lauderdale, FL 33316
(305) 524-6289
Attorney for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that in compliance with Rule 19.3 I have mailed a copy of this Petition for Writ of Certiorari to WILLIAM B. MILLIKEN, ESQ., counsel for Respondents, 5915 Ponce De Leon Boulevard, Suite 63, Miami, Florida 33146, this 16th day of July, 1984.

Edward R. Fink

Edward R. Fink

APPENDIX

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Note: The requirement for a pilot formerly was found at 46 U. S. Code 391(a), and it was briefed below at that location.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

IN ADMIRALTY

CASE NO. 80-6061-Civ-JAG
(Consolidated with Case
No. 80-1864-Civ-JAG)

P.E.P. et al.,

Plaintiff,

vs.

MORAN MARITIME ASSOCIATES,
et al.,

Defendants.

_____/

FINDINGS OF FACT AND CONCLUSIONS

OF LAW

THIS CAUSE having come before the Court for non-jury trial on March 21, 1983, and the Court having heard testimony introduced by the parties, reviewed the exhibits introduced into evidence during the course of the trial, reviewed the memoranda of law submitted by counsel, and having heard argument of counsel, now makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. That at all times material hereto MORAN ATLANTIC TOWING CORPORATION was a corporation organized and existing under and by virtue of the laws of the State of Delaware with its principal place of business in Wilmington, Delaware and was at all times material hereto the owner of the Tug ALICE MORAN.

2. That at all times material hereto MORAN TOWING OF TEXAS, INC. was a corporation organized and existing under and by virtue of the laws of the State of Texas with its principal place of business in Port Arthur, Texas and was at all times material hereto the charterer and/or operator of the Tug ALICE MORAN.

3. That at all times material hereto MORAN MARITIME ASSOCIATES was a partnership between MORAN BARGE CORPORATION and OVERSEAS PETROLEUM CARRIERS, INC., owners of the Barge NEW YORK.

4. That at all times material hereto P.E.P., INC., was a Florida corporation with its principal place of business in Fort Lauderdale, FLorida and was the owner of the PILOT NO. 2.

5. That on or about January 17, 1980 the Barge NEW YORK under the tow

of the Tug ALICE MORAN grounded at the inlet to Port Everglades, Florida.

6. That at all times material hereto CHARLES ROMANO was the master of the Tug ALICE MORAN and was the holder of U.S. Coast Guard's license No. 489109. He is certified to serve as master of steam and motor vessels of not more than 300 gross tons, limited to 200 miles offshore of the continental shelf of the Atlantic Coast of the United States while engaged in the mineral and oil industry; master of uninspected motor vessels of any gross tons on any oceans. His license is further endorsed to certify him as a master of steam and motor vessels of not more than 300 gross tons upon oceans while engaged in the mineral and oil industry. He does not hold a State or Federal pilot license for Port Ever-

glades, Florida.

7. That at all times material hereto the Tug ALICE MORAN, registration No. 570205 was a self propelled steel hull motor vessel built in 1975 having a center line length of 118 feet and two diesel powered engines.

8. That an ad interim stipulation for value of has been filed herein in the sum of Two Million Six Hundred Twenty One Thousand Eight Hundred Dollars ($2,621,800.00).

9. That the Barge NEW YORK Official No. 524266 is a steel tank barge duly documented under the laws of the United States under a consolidated certificate of enrollment and license. She was built in 1970 and is 508.1 feet long, 89.6 feet wide and 41.4 feet deep. She has a gross tonage of 14,187 and is certificated to carry grade A

product of up to 250,000 barrels. The barge has no means of propulsion and is unmanned.

10. The value of the Barge NEW YORK is $9,000,000.00.

11. On January 17, 1980 the Barge NEW YORK was loaded with gasoline with a value of $8,740,947.00.

12. That the subject grounding occurred at 0335 hours on January 17, 1980. As a result of the grounding, the Barge NEW YORK was holed and approximately 69,000 gallons of high test gasoline spilled into the Port Everglades harbor.

13. That at the time of the grounding the seas were 2 to 3 feet with a light southeastly wind, visibility was 5 miles, the tides were flooding.

14. That at the time of the

stranding the Barge NEW YORK was being assisted by the tugs FORT LAUDERDALE and CAPTAIN NELSON of PORT EVERGLADES TOWING.

15. That at all times material hereto ROBERT I. JACKSON, EDWARD CRAY, and WALTER SWETT were on board the PILOT NO. 2.

16. The PILOT NO. 2 is a pilot boat Official No. 504342. She is 34.3 feet long and has 216 horse power. She was built in 1966. The pilot boat had a value of $75,000.00.

17. On January 17, 1980 in the early morning hours JACKSON, SWETT, and CRAY were on duty at the pilot office when they received a telephone call alerting them to some type of problem in the Port Everglades Channel. They proceeded to board PILOT NO. 2 and proceeded to the channel. Radio contact

was established between PILOT NO. 2 and the ALICE MORAN and in particular between JACKSON and ROMANO. A substantial portion of the radio conversation was recorded. The recording and transcript thereof were placed in evidence.

18. The Courts finds from a factual standpoint that ROBERT JACKSON provided advice to CAPTAIN ROMANO on two occasions on January 17, 1980 which were of benefit to CAPTAIN ROMANO. In particular on page 5 of the radio transcript CAPTAIN ROMANO asked ROBERT JACKSON: "Do you think she aground where she's sitting right now or is she still moving free?" To which JACKSON replied "captain, her, her bow maybe aground, you'll be able to tell a little bit better***if you can remember if her heading has changed any***if she looks like she has swung to the south a

little bit, her nose is, she is heading more southwest than she was before, her bow may just be touching. But***I would just guess she is free right now." A few minutes later as indicated in the transcript on page 9 CAPTAIN ROMANO again asked for advice as follows: "Is she still swinging? Can you see?" To which ROBERT JACKSON responded "***Captain I think she might be.***Let me get closer to the bow so I can take a look***".

19. The Court finds that as a result of the foregoing advice, that ROBERT JACKSON should be awarded the sum of $1,000.00 for his services, EDWARD CRAY the sum of $600.00, WALTER SWETT the sum of $600.00, and P.E.P. the sum of $600.00.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties and the subject matter of the litigation pursuant to the General Maritime Law and by virtue of Rule 9(h), Federal Rules of Civil Procedure.

2. Salvage service "need not always take the form of physical assistance." M. Norris, The Law of Salvage, p. 39 (1958). Standing by a distressed vessel at her request is an acknowledged salvage service.[1]

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[1] Many cases hold that standing by is a salvage service. Some of them include: Pluto v. Ocklawaha, 1966 A.M.C. 153, 348 F.2d 62 (2d. Cir., 1965); Johnny O v. Barge LBT No. 4, 1969 A.M.C. 1804, 416 F.2d 407 (5th Cir., 1969); South American S.S. Co. v. Atlantic Towing Co., 1928 A.M.C. 148, 22 F.2d 16 (5th Cir., 1927); The Pendragon Castle v. United States, 5 F.2d 56 (2d Cir., 1924); Conolly v. S.S. Karina II, 1969 A.M.C. 319, 302 F.Supp. 675 (E.D. N.Y. 1969); In re Yamashita-Shinnihon Kisen v. Hellenic Int'l Shipping, 1969 A.M.C. 2102, 305 F.Supp. 796 (D. Ore. 1969); Diesel Vessel North Star v. Diesel Vessel Frigidland, 1940 A.M.C. 1017 (N.D. Cal. 1940); The Manchester Bri-

gade v. United States, 276 F. 410 (E.D. Vir. 1921); The Priscilla, 153 F. 476 (S.D.N.Y. 1907); The Apache, 124 F. 905 (E.D.S.C. 1903); The Hudson, 68 F. 936 (S.D.N.Y. 1895); The River Belle, 153 F. 475 (S.D.N.Y. 1893); The Underwriter, 24 Fed. Case 528 (No. 14341) (C.C.S.D. N.Y. 1857); The Courier, 6 Fed Cas. 647 (No. 3283) (Super. Ct. S.D. Fla., 1836)

The rationale is that standing by aids the vessel because it provides a means of safe escape and a source of assistance to the distressed crew.[2]

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[2] M. Norris, supra note 1, at p 39-40. For discussions of this rationale underlying the standing by doctrine, see Manchester Brigade, supra note 1, 276 F. at p. 411; The Courier, supra note 1, 6 Fed. Ca. at p. 648; and the Tower Bridge, (1936) p. 30.

In order to obtain a salvage award for standing by two conditions must exist: (1) the distressed vessel must authorize the salvor to stand by; (2) the salvor must also be prepared to render physical assistance to the distressed vessel.[3]

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[3] This requirement was articulated in The Priscilla, supra note 1, 153 F. at p. 480. It is also implicit in the rationale of the standing by doctrine. Standing by is a salvage service because it provides a means of safe escape and ready assistance. Therefore, to get a reward the salvor must be prepared to offer these services. In the subject case there was no need for escape.

It has been held that giving advice "is not an element upon which salvage can be awarded." Gabelich v. Patria, 1934 A.M.C. 147, 149 (S.D. Cal 1933).[4]

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[4] Statements supporting this position appear in The Little Joe, Lush. 88, 167 Eng. Rep. 46 (Adm. Ct. 1860), and in Vrow Margaretha, 4 C. Rob, 103, 165 Eng. Rep. 551 (Adm. Ct. 1801).

However other courts have articulated a broad concept of salvage which would seem to include giving advice. The Supreme Court in The Blackwall, 77 U.S. (10 Wall.) 1 (1869) said:

> Useful services of any kind rendered to a vessel or her cargo, exposed to any impending danger and imminent peril of loss or damage, may entitle those who render such services to salvage reward." (emphasis added) Id. at p. 11.

In South American S.S. Co. v. Atlantic Towing Co., 1928 A.M.C. 148, 22 F.2d 16 (5th Cir., 1927), the court applied the broad test that "rendering whatever assistance needed (in a situation of danger) constitutes salvage service." 22 F.2d at 17. The Court held that giving advice to change course was a salvage service because the vessel was "in imminent danger of going ashore and becoming a total loss, and that she would have done so if it had not been for the warning." The Court concludes that the advice provided by JACKSON to CAPTAIN ROMANO as set forth in the findings of fact constitutes a sufficient basis upon which

to award salvage in this matter.

3. Having determined salvage service have been performed in this case, the Court must next set the award. All those who rendered a service in the salvage operation are entitled to share in the award, whether or not they have "actively participated". St. Paul Marine Transport v. Cerro Sales Corp., 505 F.2d 1115 (9 Cir., 1974). Accordingly even though only JACKSON gave advice to CAPTAIN ROMANO, the others on board the PILOT BOAT NO. 2 are also entitled to an award as is the owner of the PILOT BOAT NO. 2. In determining the amount to be awarded to each salvor, the Court is guided by the elements set forth in The Blackwall, supra.

4. The Court concludes as a matter of law that the following awards

should be made in this matter as follows:

ROBERT JACKSON	$1,000.00
EDWARD CRAY	600.00
WALTER SWETT	600.00
P.E.P., INC.	600.00
TOTAL	$2,800.00

5. The salvors have raised the question as to their entitlement to attorneys fees. This issue will be reserved for further ruling upon receipt of Post-Trial Memoranda submitted by the parties.

6. Final Judgment shall be entered in accordance with these findings and conclusions but not until such time as this Court has ruled on the issue of attorneys fees. Cost to be hereinafter taxed.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida this 7th day of April, 1983.

/S/ JOSE A. GONZALEZ, JR.
Judge, U.S. District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 80-1864-CIV-JAG
80-6061-CIV-JAG

In re Complaint of:

MORAN ATLANTIC TOWING CORP.

P.E.P., et al.,

Plaintiff,

vs. FINAL JUDGMENT

MORAN MARITIME ASSOCIATES, et al.,

Defendants.

---/

THIS CAUSE has come before the Court for review sua sponte. The Court has reviewed the record, and being otherwise duly advised, it is

ORDERED AND ADJUDGED that, in accordance with the Court's Findings of Fact and Conclusions of Law filed April 8, 1983, and the Court's Order of April 8, 1983, denying the plaintiff's claim for attorneys fees, Final Judg-

ment be and the same is hereby entered in favor of the plaintiffs and against the defendants in the following amounts, plus costs:

Robert Jackson	$1000.00
Edward Cra[illegible]	600.00
Walter Swett	600.00
P.E.P., Inc.	600.00
Total	$2800.00

(For which sums let execution issue.)

DONE AND ORDERED in chambers at Fort Lauderdale, Florida, this 28th day of June, 1983.

/S/ JOSE A. GONZALEZ, JR.

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 80-6061-CIV-JAG
80-1684-CIV-JAG

P.E.P., INC., et al.,

Plaintiffs,

vs. ORDER

MORAN MARITIME ASSOCIATES, et al.,

Defendants.

_____/

THIS CAUSE has come before the Court upon the plaintiff's claim for attorneys fees. The Court has received and considered the memoranda of law submitted on behalf of both parties on the issue of attorneys fees in admiralty cases. Although this Court has the discretionary power to grant attorneys fees in admiralty cases, the Court concludes that there is no basis in this case for an award of attorneys fees. Accordingly, it is

ORDERED AND ADJUDGED that the claim for attorneys fees be and the same is hereby DENIED.

DONE AND ORDERED in chambers at Fort Lauderdale, Florida, this 8th day of April, 1983.

/S/ JOSE A. GONZALEZ, JR.

UNITED STATES DISTRICT JUDGE

DO NOT PUBLISH

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 83-5494
Non-Argument Calendar

P.E.P. INC., et al.,

Plaintiffs-Appellants,

versus

MORAN MARITIME ASSOCIATES, et al.,

Defendants-Appellees.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

(May 4, 1984)

Before HATCHETT, ANDERSON and CLARK, Circuit Judges.

PER CURIAM:

In this appeal, we review the district court's salvage award and denial of attorneys's fees in appellants',

P.E.P., Inc., et al. (P.E.P.), suit for salvage services rendered to appellees, Moran Maritime Associates, et al.(Moran). Appellants contend that the district court erred because (1) it based the small salvage award on erroneous principles and a misapprehension of the facts; (2) the award was so grossly inadequate as to constitute an abuse of discretion; and (3) the denial of attorneys' fees was an abuse of discretion.

Background

On January 17, 1980, the Barge NEW YORK under the tow of Tug ALICE MORAN, both owned by appellees, grounded at the inlet to Port Everglades, Florida. At the time of the grounding, the Barge NEW YORK was loaded with high-test gasoline with a value of $8,740,947. Upon impact, approximately 69,000 gal-

lons of gasoline spilled into the Port Everglades harbor. Weather conditions were good, and, because the grounding occurred within the harbor, two tugs, FORT LAUDERDALE and CAPTAIN NELSON of Port Everglades Towing, were assisting the Barge NEW YORK at the time of the incident.

When the Barge NEW YORK ran aground at 0335 hours, appellant Robert I. Jackson was the duty pilot, appellant Edward Cray was a deputy pilot and appellant Walter Swett was the operator of P.E.P.'s pilot boats. Upon receiving a telephone call alerting them to a problem in the Port Everglades Channel, they boarded PILOT NO. 2 and proceeded to the channel. The pilots detected the smell of gasoline fumes, but at no time before or after their arrival did a fire break out. The pilots posi-

tioned themselves such that the gasoline spill and fumes were carried away from the pilot boat, and they remained on the scene approximately 2 1/2 hours. During that time, appellants rendered no physical assistance; the pilots did not put a line on or board either the Barge NEW YORK or the Tug ALICE MORAN, and at no time did anyone from the ALICE MORAN board PILOT NO. 2.[1] Jackson, however, maintained intermittent radio contact with Charles R. Romano, the master of the Tug ALICE MORAN, throughout the 2 1/2 hour period. The district court determined that, by virtue of this radio communication, two pieces of advice offered by Jackson to Romano constituted salvage services meriting an award. Accordingly, the district court awarded Jackson $1,000, Cray $600, Swett $600, and P.E.P. $600,

[1]The NEW YORK is an unmanned barge.

for a total award of $2,800. The salvors sought attorney's fees in addition to their awards, which the district court denied after receiving post-trial memoranda. In this appeal, appellants contend that the amount of the award is inadequate and that the denial of attorney's fees was an abuse of discretion.

The Award

There is no dispute that the "assistance" rendered constituted salvage services entitling appellants to some award. Rather, appellants contend that the amount of the award was too low. An appellate court will not increase an award unless one of three circumstances exists: (1) the award was based on erroneous principles; (2) the award was based on a misapprehension of the facts; or (3) the award is so grossly

inadequate as to constitute an abuse of discretion. See Compania Galeana, S.A. v. Motor Vessel, etc., 565 F.2d 358, 360 (5th Cir. 1978). Appellants challenge the award in the instant case on all three grounds.

A. Erroneous Principles

In determining the amount of the salvage award, the district court expressly indicated that the guiding principles are those articulated in The Blackwall, 77 U.S. (10 Wall.) 1, 14, 19 L.Ed. 870, ___ (1869).[2] Appellants

[2] These factors include:

> 1. The labor expended by the salvors in rendering the salvage service. 2. The promptitude, skill, and energy displayed in rendering the service and saving the property. 3. The value of the property employed by salvors in rendering the service, and the danger to which such property was exposed. 4. The risk incurred by the salvors in securing the property from the impending peril. 5. The value of the property saved. 6. The degree of danger from which the

contend that the district court erred in relying exclusively on the principles established in The Blackwall. In appellants' view, those principles are too restrictive to provide adequate salvage awards in modern marine disasters. Appellants contend, therefore, that the salvage award was based on erroneous legal principles because the district court failed to consider, in addition to the principles established in The Blackwall, (1) the appellees' alleged negligence, and (2) appellees' potential legal liability had not appellants helped to prevent catastrophic damage to the city of Fort Lauderdale from explosion or to the environment from pollution.

property was rescued.

The Blackwall, supra.

Arguably, it might not have been improper for the district court to have considered these factors suggested by appellants in computing the salvage award. For example, in Vinco Enter., Ltd. v. New York Dock Ry., 540 F. Supp. 1183, 1188 (E.D. N.Y. 1982), the court determined that because the vessel's misconduct caused the peril, "it appears appropriate not only to include the value of the cargo [in addition to the value of the vessel] as a factor to be considered in determining a just award . . ., but also to impose liability for that award entirely on the vessel owner without deduction for the cargo's proportionate share." Furthermore, in United States v. Cornell Steamboat Co., 202 U.S. 184, 26 S.Ct. 648, ___ L.Ed. ___ (1906), the Supreme Court held that the government, which was obligated under statute to refund

prepaid duties if the goods were destroyed by fire or other casualty, was obligated to pay a salvage award to those mariners who saved the goods from destruction and thereby prevented the government from having to refund the duties. Under the reasoning of Vinco and Cornell, therefore, a court might possibly have considered appellees' negligence and potential liability in computing a salvage award.

We are not prepared to hold, however, that the district court committed error in failing to consider these nuances in calculating the amount of the award. The court based its decision on the traditional principles of salvage award determination, those established in The Blackwell. Although The Blackwell does not contain a comprehensive catalog of the relevant factors,[3] those

principles are the core of any salvage award determination. The award, therefore, was not based on erroneous legal principles.[4]

B. Misapprehension of the Facts

Appellants contend that the district court's award was based on a misapprehension of the facts because the court failed to make a finding that appellants' lives were endangered by a possible explosion. The record contains some conflict of evidence as to

[3] See G. Gilmore and C. Black, The Law of Admiralty, 559 (2d ed. 1975).

[4] In a related claim, appellants assert that the district court erred in excluding from evidence on grounds of relevancy the findings of fact of the U.S. Coast Guard Administrative Law Judge in the licenses proceeding against Charles Romano, captain of the Tug ALICE MORAN. Appellants proffered the findings as evidence in order to demonstrate appellees' negligence. In view of our resolution of the negligence issue in text, we need not determine whether the exclusion of the findings was error because any error would be harmless.

the actual danger appellants were exposed. Although appellants' expert witness suggested numerous possible ignition sources, there was no fire. Furthermore, a Coast Guard captain testified that, when he arrived at 0530 hours, "it was fairly safe," and that the situation "was no more dangerous than any other tanker that was in the port and discharging." Moreover, appellants at all times were positioned away from the gasoline and fumes. Under these circumstances, we cannot say that the district court based the salvage award on a misapprehension of the facts in failing to find that the appellants' lives were endangered. Cf. In re Yamashita-Shinnihon Kisen, 305 F. Supp. 796, 800-01 (D. Ore. 1969) (even though salved vessel's cargo was highly combustible and small fires ignited by an oil spill constituted a possible

source of ignition, boarding crew was not exposed to the risk of explosion).

C. Abuse of Discretion

In suggesting that the district court's salvage award was so grossly inadequate as to be deemed an abuse of discretion, appellants urge this court, essentially, to embrace a method of computation which no modern court has accepted: an award based upon a percentage of the total value of the salved property. Salvage awards are no longer based upon a fixed percentage, and the value of the salved property is only one factor, albeit an important factor, that a court considers in calculating an award. See 3A Norris, Benedict on Admiralty § 240. While the value of the salved property in this case was quite large,[5] numerous other factors justify the award given. For instance, appellants were on the scene

only 2 1/2 hours, and the nature of the assistance provided during that short time, advice and standby, was of a low order. Furthermore, because the incident occurred in port, various other sources of assistance could and did render salvage services. Accordingly, we find that the district court's award was not an abuse of discretion.

Attorney's Fees

The granting of attorney's fees in salvage actions is discretionary. See Compania Galeana, supra, at 360. Appellants contend that the district court abused its discretion in denying attorney's fees because, allegedly, ap-

[5]The parties stipulated that the value of the Tug ALICE MORAN was $2,621,800 and the Barge NEW YORK was $9,000,000. Additionally, the gasoline cargo was valued at $8,740,947. We express no view as to whether the district court should or should not have included the value of the cargo in addition to that of the vessels in computing the award.

pellees caused unnecessary litigation and did not negotiate in good faith. P.E.P. filed an amended complaint for salvage on February 28, 1980, requesting $7,500,000. On March 2, 1981, P.E.P. made a written offer of settlement proposing that appellees agree to use only pilots supplied by the Port Everglades Pilots Association when leaving or entering Port Everglades and that appellees pay appellants' counsel $25,000 in attorney's fees. At the time appellants' counsel made the settlement offer, no discovery had taken place nor had any been scheduled, and appellants' counsel had merely filed the complaint, the amended complaint and responded to a motion to dismiss. Given the fact that the salvage award in this case totaled $2,800, we cannot say that the district court abused its discretion in denying attorney's fees

under these circumstances.

AFFIRMED.

33 U.S.C. § 1321 (Water Quality Improvement Act) provides in pertinent part:

(f)(1) Except where an owner or operator can prove that a discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether any such act or omission was or was not negligent, or any combination of the foregoing clauses, such owner or operator of any vessel from which oil or a hazardous substance is discharged in violation of subsection (b)(3) of this section shall, notwithstanding any other provision of law, be liable to the United States Government for the actual costs incurred under subsection (c) of this section for the removal of

such oil or substance by the United States Government in an amount not to exceed, in the case of an inland oil barge $125 per gross ton of such barge, or $125,000, whichever is greater, and in the case of any other vessel, $150 per gross ton of such vessel (or, for a vessel carrying oil or hazardous substances as cargo, $250,000), whichever is greater, except that where the United States can show that such discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner, such owner or operator shall be liable to the United States Government for the full amount of such costs. Such costs shall constitute a maritime lien on such vessel which may be recovered in an action in rem in the district court of the United States for any district

within which any vessel may be found. The United States may also bring an action against the owner or operator of such vessel in any court of competent jurisdiction to recover such costs.

* * *

46 U.S.C. § 183(a)(Limitation) provides:

The liability of the owner of any vessel...for any...loss...done, occasioned, or incurred, without the privity or knowledge of such owner or owners shall not...exceed the amount or value of the interest of such owner in such vessel, and her freight then pending...

* * *

46 U.S.C. § 3702(Carriage of Liquid Bulk Dangerous Cargoes) provides:

(a) Subject to subsections (b)-(e) of this section, this chapter applies to a tank vessel...

* * *

46 U.S.C. § 8502(Pilots) provides:

(a) A coastwise seagoing vessel, when not sailing on register and when underway (except on the high seas), shall be under the direction and control of a pilot licensed under section 7101 of this title if the vessel is--

...

(2) subject to inspection under chapter 37 of this title...

* * *

Florida Statutes § 376.12 (Liabilities and defenses of terminal facilities and vessels) provides:

(1) Because it is the intent of this chapter to provide the means for rapid and effective cleanup and to minimize damages, any vessel, or its agents or servants, who permits or suffers a prohibited discharge or other

polluting condition to take place within state boundaries shall be liable to the fund for all costs of cleanup or abatement, up to an amount not to exceed fourteen million dollars ($14,000,000.00) or one hundred dollars ($100.00) per gross registered ton of such vessel, whichever is the lesser. When the department can show that such discharge was the result of willful or gross negligence or willful misconduct within the privity or knowledge of the owner or operator or agent thereof, such owner or operator shall be liable to the fund for the full amount of such sums expended...

NO. 84-136

in the

Supreme Court

of the

United States

October Term, 1984

P.E.P., INC., ET AL.,

Petitioners,

vs.

MORAN MARITIME ASSOCIATES, ET AL.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI To The United States Court of Appeals For The Eleventh Circuit

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Attorneys for Respondents

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SUMMARY OF ARGUMENT

There is no basis for this Court to exercise certiorari jurisdiction in this cause. There is no conflict among or between any court; and there is no presentation of an important question for this Court's determination.

ARGUMENT

This is a very simple maritime salvage case which was tried non-jury by the District Judge who determined that the Petitioners had rendered salvage services, were entitled to a salvage award, and accordingly rendered the appropriate award. The Petitioners, unhappy with the amount of the award, appealed to the Eleventh Circuit Court of Appeals contending that: (1) the award was based upon erroneous principles; (2) the award was based upon a misapprehension of the facts; and (3) the award was grossly inadequate so as to constitute an abuse of discretion. Petitioners' allegations of erroneous principles were the same before the Eleventh Circuit Court of Appeals as they are before this Court and that is, that the District Judge refused to consider Respondents' alleged negligence in causing the initial grounding and Respondents' potential legal liability had there been catastrophic damage to the City of Fort Lauderdale from an explosion (which did not happen), or damage to the environment caused by pollution, (which did not happen). The Eleventh Circuit Court of Appeals found no error in the District Judge's refusal to consider these elements. These elements only go to the amount of the award or, if you will, the fund from which the award is satisfied. The District Judge had before it stipulated values of the tug and barge of $11,621,800.00. He awarded $2,800.00. We would

respectfully suggest to the Court that it was harmless error at best for the District Judge not to consider the additional elements as contended by Petitioners because it makes no difference whether the District Judge looks at a fund of $20,000,000.00 or $11,000,000.00 when he determines that the reasonable salvage award is $2,800.00. The Petitioner's last ditch attempt to "salvage" a greater award simply comes too late, without any justifiable basis, for as was recognized as long ago as 1840:

> It is well known, that in salvage cases the appellate courts of the United States, sitting in admiralty, are not disposed to encourage appeals . . . except where there has been some plain, clear, and determinate mistake of law or fact. The allowance of salvage rests in the exercise of the sound discretion of the court. ***The merits of such services rarely admit of any definite and exact computation . . . In matters of mere discretion, the mind of man must even be "varium et mutabile". It is on this account that it has become a general rule . . . of our appellate courts, sitting in admiralty, not to change the decree of the court below, unless there is an exceedingly strong case made out, of an abuse or palpable mistake in the exercise of its discretion in the decree of salvage. *Bearse v. Three Hundred and Forty Pigs of Copper*, Fed. 1193 (CC. Mass. 1840).

In this case the only salvage service rendered was radio advice given by one of the Petitioners to the tug captain. The advice was recorded and that recording was played to the District Judge. Additionally, the

recording was transcribed and the transcript of the recording was introduced into evidence for the Judge's review. In reviewing the radio transcript, the Trial Judge found only two minor instances where advice given by the pilot to the tug captain could be construed to have been of any benefit to the tug.

In evaluating the circumstances surrounding the salvage the following circumstances existed: (1) there was no fire; (2) there was no damage to Petitioners' boat; (3) there was no physical assistance rendered by the Petitioners, i.e., no lines were attached between the vessels, none of the Petitioners boarded either the tug or barge, the crew of the tug did not board the pilot boat; (4) while Petitioners were on the scene the gasoline spill and fumes were being carried away from them by the prevailing wind and flood tide; (5) Petitioners were not in any danger while they were on the scene; (6) Petitioners were on the scene only two and half hours; (7) no unusual or special skill was involved in the Petitioners efforts; and (8) the "salvage" occurred in port.

When the risk is inconsiderable and the service slight, the award should be little more than mere remuneration "pro opere et labore." *The High Cliff*, 271 F. 202 (5th Cir., 1921). The providing of advice is a low grade service because the salvor provides non-physical assistance and does not expose his property to a high degree of danger. Cf. *South American S.S. Co. v. Atlantic Towing Co.*, 22 F.2d 16 (5th Cir., 1927). The award should be lower when the salvage is rendered in a harbor because of the location of aid. Cf. *Sears v. S/S American Producer*, 1972 AMC 1647 (N.D. Cal., 1972);

The O.C. Hanchett, 76 F. 1003 (2d Cir., 1896): 3A *Benedict on Admiralty* Section 252 (7 Ed., 1980).

The discretion of the trial court in assessing the amount of salvage compensation is a well settled rule of law and is largely a matter of facts and circumstances. *The Dos Hermanos*, 10 Wheat, 306, 6 L.Ed 328 (U.S. 1825). The trial judge herein took into consideration the circumstances surrounding the salvage and determined that the advice given by Petitioners did not appreciably contribute to the success of the salvage. There has been no showing of any error or abuse of discretion on the part of the trial judge herein.

CONCLUSION

We would respectfully submit that Petitioners have failed to sustain their burden under Rule 19. The Court of Appeals correctly affirmed the Trial Court's final judgment in favor of Respondents.

Respectfully submitted,

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BY: _____
WILLIAM B. MILLIKEN
Attorneys for Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to: EDWARD R. FINK, Suite 309, 2190 S.E. 17th Street, Fort Lauderdale, Florida 33316 this 3 day of August, 1984.

BY: WILLIAM B. MILLIKEN